Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY
Petitioner

versus

FREDERICK CARL KRAUSE, III
Respondent

On Petition for Writ of Certiorari to the Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION PERMITS THE POLICE TO USE A RUSE WITH REGARD TO THEIR PURPOSE TO OBTAIN A VOLUNTARY CONSENT TO SEARCH.

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No. -

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COMMONWEALTH OF KENTUCKY
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versus

FREDERICK CARL KRAUSE, III
Respondent

On Petition for Writ of Certiorari to the Kentucky Supreme Court

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Kentucky, as counsel for Petitioner, Commonwealth of Kentucky, petitions this Court to issue a writ of certiorari to the Kentucky Supreme Court.

OPINION BELOW

The petitioner seeks certiorari review of the published opinion in Krause v. Commonwealth, 206 S.W.3d 922 (Ky. 2006).

The procedural history leading to the Kentucky Supreme Court opinion is as follows.

On July 28, 2003, the McCracken County Circuit Court entered an order denying Krause's motion to suppress the evidence. The trial court concluded that despite Trooper Manar's use of strategic deception with regard to his purpose for searching, Krause's consent to search his home was voluntary. On October 29, 2004, the Kentucky Court of Appeals rendered an opinion deferring to the trial court's conclusion that Krause's consent to search was voluntary and affirmed his conviction. Krause filed a motion for discretionary review with the Kentucky Supreme Court, which was granted. On October 19, 2006, the Kentucky

Supreme Court rendered a published opinion reversing and remanding this case. The Kentucky Supreme Court held that Krause's consent was coerced and violated the Fourth Amendment of the United States Constitution. The Court reasoned that the timing of the police visit, the substance of the ruse and the tactic of employing the ruse to obtain consent were the factors which rendered Krause's consent involuntary. The Commonwealth of Kentucky filed a petition for rehearing, which was denied on December 21, 2006.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Sec. 1257(a). The petitioner seeks review of a Kentucky Supreme Court Opinion rendered October 19, 2006, reversing and remanding this case.

The Commonwealth of Kentucky filed a timely petition for rehearing, which was denied on December 21, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Constitutional Amendment IV-Search and Seizure:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On March 18, 2003, Trooper Jason Manar, Kentucky State Police, got information from a subject that Joe Yamada, Krause's co-defendant, was selling cocaine from the residence at 523 South 19th Street in Paducah, Kentucky. This information came from a subject on whom Trooper Manar located cocaine. The person providing this tip was arrested on March 17, most likely a few hours prior to Trooper Manar going to appellant's address. This subject also specifically described the location of Yamada's home on 19th Street and also described one of the vehicles which should have been parked out front.

Trooper Manar then went to 523 South 19th Street with Trooper Danny Shearer to conduct a "knock and talk." Frederick Krause and Joe Yamada lived in the residence, owned by Krause. The troopers arrived at the house at approximately 3:53 a.m. and knocked on the door. Krause

was sitting on the couch in the living room when he heard the knock. Trooper Manar was uncertain who answered the door, but stated that he thought it was Joe Yamada. Trooper Manar said that he wanted to come inside and talk. More specifically, the trooper stated something to the effect that he had some things he needed to talk to him about and could he come inside. Trooper Manar didn't say what he wanted to talk to him about. The troopers were invited inside by one of the residents.

The other roommate then came out from the back bedroom. Trooper Manar told them that a young girl at Baptist Hospital claimed that she had been assaulted and that the assault took place in their house. Trooper Manar didn't specify what kind of assault took place, however, this allegation was not true. Trooper Manar was there to conduct a knock and talk and see if he could get consent to look around the house. Trooper Manar then asked Yamada if the

troopers could take a look around to see if any of the furniture, beds or bedspreads were the same. Trooper Manar was in full uniform and did identify himself as a trooper with the Kentucky State Police.

Yamada said the troopers could take a look around and that nothing like that had happened. Yamada first asked if he could go back and clean up his room. Trooper Manar asked if he could go with him and Yamada said yes. When Trooper Manar went back to Yamada's room with him, he saw Yamada pick up a spoon and put it behind his back. Trooper Manar asked what was wrong with the spoon, was it special and asked to see it. Yamada turned the spoon over to Trooper Manar and later identified the substance on the spoon as cocaine. Trooper Manar asked Yamada several times if there was any more cocaine in the house. Finally, Yamada pulled a bag out of his robe and said that was all the

drugs in the house. The cocaine that Yamada gave Trooper Manar weighed approximately 3.1 grams.

Trooper Manar was sure to ask Krause if he could search his room before conducting such search. Krause gave his permission stating that there was nothing in it. Krause was seated on the couch in the living room while the search was conducted and didn't say anything, but was trying to comply and answer any questions. The Trooper asked if there were any drugs in the house. Krause told the trooper no even though he was aware there were drugs in the house. Trooper Manar also found a bag of marijuana in a laundry basket weighing approximately 32.6 grams and other drug paraphernalia. Neither resident ever asked the trooper to stop searching. Both Yamada and Krause were placed under arrest after the search of the house was complete and both had been patted down.

Krause filed a motion to suppress the evidence alleging that his consent to search was involuntary under the Fourth Amendment as it was obtained by ruse. The trial court entered an order denying this motion, concluding that Krause's consent was valid under the Fourth Amendment. Krause entered a conditional plea to one count of first degree possession of a controlled substance, one count of possession of drug paraphernalia, second offense and one count of possession of marijuana.

On appeal, the Kentucky Court of Appeals deferred to the trial court's finding of voluntary consent. However, on discretionary review in the Kentucky Supreme Court, the Court held that Krause's consent was coerced, thus involuntary, and violated the Fourth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED IN ORDER TO CLARIFY WHETHER THE FOURTH AMENDMENT PERMITS THE POLICE TACTIC OF USING A RUSE WITH REGARD TO THEIR PURPOSE TO OBTAIN VOLUNTARY CONSENT TO SEARCH.

A. Summary of Argument

This Honorable Court has concluded that police may employ stratagem and deception in obtaining evidence and voluntary confessions. This Court has not addressed whether the police may employ deception with regard to their purpose and obtain voluntary consent to search. There is a wide split among the state and federal courts regarding this issue. Kentucky's petition should be granted so this court can resolve the issue, therefore aiding the lower courts and the police in carrying out their duties in conformity with the Fourth Amendment.

B. Tropper Manar's deception as to his purpose did not render Krause's consent involuntary

This Honorable Court has held that in the detection of many types of crimes, the government is entitled to use decoys and to conceal the identity of its agents. Lewis v. United States, 385 U.S. 206 (1967). In Lewis, this Court held that the Fourth Amendment was not violated when a federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into the petitioner's home where an unlawful narcotics transaction was consummated and evidence obtained. The Court reasoned that the appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and

thus to disclose the would-be violators of the law. 385 U.S. at p. 209, n. 5 citing to Sorrells v. United States, 287 U.S. 435 (1932).

To determine the meaning of voluntariness in consent to search cases, this Court, in Schneckloth v. Bustamonte, 412 U.S. 218 (1973) turned to the body of case law governing voluntary confessions. In the context of confessions, the question is whether the confession is a product of an essentially free and unconstrained choice by its maker. Id. 412 U.S. 225. In Colorado v. Spring, 479 U.S. 564 (1987) this Court specifically held that Defendant's waiver of his Fifth Amendment privilege against self-incrimination was knowingly and intelligently made, even if the defendant was not aware that he could be questioned about a separate crime. The mere employment of a ruse, or "strategic deception," does not render a confession

involuntary so long as the ploy does not rise to the level of compulsion or coercion. Illinois v. Perkins, 496 U.S. 292, 297 (1990). See also Frazier v. Cupp, 394 U.S. 731, 739 (1969).

Despite this Honorable Court's conclusions that, in furtherance of police investigations, the police may employ strategic deception in obtaining evidence and voluntary confessions, there is still inconsistency within the different federal circuits as to whether the Fourth Amendment permits the police to use a ruse with regard to their purpose to obtain voluntary consent to search. See United States v. Rodriguez-Perez, 625 F.2d 1021 (1st Cir. 1980) (voluntariness of consent to warrantless search of defendant's hotel room was not undermined by government's use of "trick" to lure defendant into lobby, i.e., agent's impersonation of one of the defendant's friends, as such involved no apparent

illegality or misconduct and did not affect voluntariness of defendant's later choices as once in the lobby he was under no compulsion to lead agents back to his room and there was no showing that the agents, who suggested that they talk in the room, would not have acquiesced in defendant's insistence that they talk in the lobby and agents made no demand "under color of office" that they be admitted to the room); United States v. Como, 340 F.2d 891 (2nd Cir. 1965)(consent involuntary unless it is free from chicanery or compulsion); Brown v. Brierley, 438 F.2d 954 (3rd Cir. 1971) (it is constitutionally permissible for police to conduct criminal investigations without revealing their official status and their clandestine purposes); United States v. Allen, 683 F.2d 114 (4th Cir. 1982) (where defendant was predisposed to change a five-dollar bill upon his supervisor's request for change, and readily

complied without seeking any assurances from supervisor, supervisor's failure to disclose his purpose, to obtain marked bills, did not vitiate defendant's consent); United States v. Davis, 749 F.2d 292 (5th Cir. 1985) (mere failure of officers to give an encyclopedic catalogue of everything they might be interested in does not alone render the consent to search involuntary); United States v. Andrews, 746 F.2d 247 (5th Cir. 1984), overruled on other grounds, United States v. Hurtado, 905 F.2d 74 (5th Cir. 1990), (the mere failure of a federal agent to state one of his purposes in requesting to inspect the defendant's guns did not render the defendant's consent to inspection involuntary); United States v. Ressler, 536 F.2d 208 (7th Cir. 1976) (use of ruse to obtain entry into their home was permissible under the Fourth Amendment); United States v. Scherer, 673 F.2d 176 (7th Cir. 1982) (government agent

was lawfully on the suspect's property after obtaining an invitation by misrepresenting his identity and, while acting within the bounds of the invitation, discovered incriminating evidence in plain view); United States v Andrews, 618 F.2d 646 (10th Cir. 1977) (acknowledging that the protections of the Fourth Amendment can be violated by guile, but artifice and stratagem may be employed to catch those engaged in criminal enterprises); United States v. Bosse, 898 F.2d 113 (9th Cir. 1989) (a ruse entry when the suspect is not informed of the purpose for which the agent seeks entry cannot be justified by consent); United States v. Lyons, 706 F.2d 321 (C.A.D.C. 1983) (fact that detectives gained admission to the defendant's hotel room upon false pretenses did not impair the validity of the defendant's consent to their entrance).

In fact, there are two circuits which have inconsistencies in the case law within the circuit. See United States v. Jones, 641 F.2d 425 (6th Cir. 1981) (recognizing that the burden of proving a valid consent required clear and positive proof that the consent was uncontaminated by duress, coercion, or trickery) and United States v. Baldwin, 621 F.2d 251 (6th Cir. 1980) (an agent may legitimately gain entrance into a house by misrepresenting his identity). See also Unites States v. Wright, 641 F.2d 602 (8th Cir. 1981) (officers' failure to reveal identity and purpose in approaching appellant not inconsistent with Fourth Amendment) and United States v. Briley, 726 F.2d 1301 (8th Cir. 1984) (misrepresentations may invalidate consent to entry if consent was given in reliance on officer's deceit).

There is also inconsistency among the individual states as to whether the police obtain voluntary consent

when they employ strategic deception with regard to their purpose for searching. See State v. Johnson, 253 Kan. 356, 856 P.2d 134 (1993) (based upon the totality of the circumstances the consent to search was voluntary, despite the officers' deception as to his purpose in searching); People v. Zamora, 940 P.2d 939 (Colo. 1997) (consent to search may be voluntary even when the person giving consent is not aware of or is misinformed as to the search's purpose); People v. Avalos, 47 Cal.App.4th 1569, 55 Cal.Rptr.2d 450 (1996) (The court found that based upon the totality of the circumstances, the defendant's consent was voluntary even though suspect was misinformed regarding the purpose of the search). State v. Johnston, 184 Wis.2d 794, 518 N.W.2d 759 (1994) (entry of undercover officers not unlawful where officers obtained consent through deceit by concealing their

identities); State v. Catania, 427 Mich. 447, 398 N.W.2d 343 (1986) (entry by undercover agent not unlawful where agent obtained entry by misrepresenting identity and purpose and did not exceed scope of invitation); State v. Nedergard, 51 Wash.App. 304 (1988) (undercover police officers' ruse entry of suspect's residence, by posing as interested buyers responding to "For Sale" sign, was permissible means of establishing probable cause for search warrant; proper limitation on ruse entry focuses not on ostensibly criminal or noncriminal purpose for which entry is gained, but on whether actions following entry fall within scope of consent, and suspect admitted that he placed no limitation on his consent to let officers "look around."); State v. McArthur, 996 P.2d 555 (Utah Ct.App. 2000) (Fourth Amendment not offended when the defendant's statements gleaned during covert

investigations conducted by those believed to be loyal friends were used by the police to pursue a criminal prosecution). But, also see People v. Daugherty, 161 Ill.App.3d 394, 112 Ill.Dec. 762, 514 N.E.2d 228, 233 (1987) (Where, law enforcement officer uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises, when his real reason is to search inside for evidence of a crime, this deception is so unfair as to be coercive and renders the consent involuntary); State v. Schweich 414 N.W.2d 227, 230 (Minn.App.1987) (tacit misrepresentation of the purpose of a search can rise to such a level of deception to invalidate the consent); State v. McCrorey, 70 Wash.App.103, 851 P.2d 1234, 1240 (1993) (distinguishing between undercover police activity and police acting in official capacity actively misstating

their purpose for gaining consent), abrogated on other grounds by State v. Head, 136 Wash.2d 619, 964 P.2d 1187 (1998); Commonwealth v. Haynes, 395 Pa.Super. 322, 577 A.2d 564, 572 (1990) (defendant's consent to be transported to the station house was invalid because police deceived the defendant as to the true purpose of the trip).

In looking to the totality of the circumstances of a case and determining whether a defendant's consent was voluntary, courts have taken into account the age of the accused, Bustamonte, 412 U.S. at 226; intelligence level, United States v. Watson, 423 U.S. 411 (1976); whether the suspect was intoxicated or under the influence of drugs when consenting, United States v. Rambo, 789 F.2d 1289 (8th Cir. 1986); the lack of any advice to the accused of his constitutional rights, Watson, 423 U.S. at 424-25; whether the suspect was

aware of the protections afforded to suspected criminals by the legal system, Watson, 423 U.S. at 424-25. In examining the environment in which consent was given, courts should ask whether the person who consented was detained and questioned for a long or short time, Bustamonte, 412 U.S. at 226; was threatened, physically intimidated or punished by the police, Watson 423 U.S. at 424; relied upon promises or misrepresentations made by the police, Watson, 423 U.S. at 424; was in custody, Watson, 423 U.S. at 424; was in a public place, Id.; either objected to the search or stood by silently while the search occurred, United States v. Olivier-Becerril, 861 F.2d 424, 425-26 (5th Cir. 1988); United States v. Espinosa, 782 F.2d 888, 890-92 (10th Cir. 1986); United States v. Lopez, 777 F.2d 543, 546-48 (10th Cir. 1985).

In this case, the only factor present which would have rendered Krause's consent involuntary was Trooper Manar's strategic deception regarding the crime he was investigating. Krause was an adult with a college education. Krause was not under the influence of any drugs. **Although Krause was not informed that he could refuse consent, he testified at the suppression hearing that he knew that he could say no to the police officer's request to enter. Krause also testified that he knew the police needed a warrant to search.** Krause knew this because he had been involved in the legal system prior to his arrest in this case. Krause was not detained long, was not physically threatened or intimidated in any manner. Krause was allowed to sit on the couch in the living room while the search took place. Finally, Krause didn't stop the police from searching and tried to

cooperate with Trooper Manar in answering any questions. Statements or conduct by a defendant inconsistent with an expectation of privacy in a given space will operate to neutralize his protected interest therein. See Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1979).

Each case regarding the voluntariness of consent to search is decided based upon the totality of the circumstances of that individual case. However, this Honorable Court needs to guide the lower courts and the police officers investigating crimes as to when, if ever, deception and stratagem may be used in the furtherance of a specific investigation. Deception as to purpose alone did not vitiate voluntary consent in this case. The Commonwealth of Kentucky respectfully requests this Honorable Court grant its petition for writ of certiorari.

CONCLUSION

WHEREFORE, certiorari review should be granted.

Respectfully submitted,

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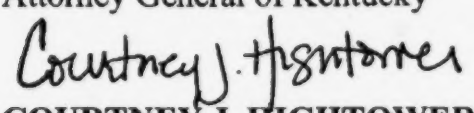
Attorney General of Kentucky



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APPENDIX TO CERTIORARI PETITION

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APPENDIX

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SUPREME COURT OF KENTUCKY

2004-SC-1009-DG

FREDERICK CARL KRAUSE III APPELLANT

V. APPEAL FROM COURT OF APPEALS
03-CA-2092-MR
MCCRACKEN CIRCUIT NO. 03-CR-00162-002

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE GRAVES

Reversing and Remanding

Appellant, Frederick Carl Krause, III, entered conditional guilty pleas in McCracken Circuit Court to First Degree Possession of a Controlled Substance, Cocaine; Use/Possession of Drug Paraphernalia, Second Offense; and Possession of Marijuana. For these crimes, Appellant was sentenced to three days' imprisonment and two and one-half (2 1/2) years of probation. Pursuant to his conditional pleas, Appellant took a direct appeal to the Court of Appeals. RCr 8.09. In an unpublished opinion, the Court of Appeals affirmed his convictions in all respects. *Krause v. Commonwealth,* 03-CA-002092-MR (rendered October 29, 2004). Appellant filed a petition for discretionary review in this Court, which we granted. CR 76.20. For the reasons set forth herein, we reverse the Court of Appeals' opinion, vacate Appellant's convictions and sentence, and remand for further proceedings.

The trial court's findings of fact in this case, while sparse, are unmistakably clear. The trial court found that Trooper Manar of the Kentucky State Police had arrested a subject for possession of cocaine. The subject told Trooper Manar that he obtained the cocaine from a house at which Appellant and his roommate, Joe Yamada, resided. Trooper Manar desired to go to the residence and search it but did not believe he had probable cause to obtain a search warrant. Because he knew that the residents would not "consent to a search for drugs," Trooper Manar "fabricated a false story that he believed would more likely result in the residents' consent to search."

Accompanied by one or two other law enforcement officers, Trooper Manar knocked on Appellant's and Yamada's door around 4:00 a.m. When one of the residents, most likely Appellant, opened the door, Trooper Manar stated that a young girl had just reported being raped by Yamada in the residence. He asked if he could look around in order to determine whether her description of the residence and its furnishings was accurate. The trial court found that Trooper Manar "knew there would be no such evidence because he knew there was no assault. His intention was to gain consent to search for drugs."

Despite finding that "the ruse employed [by Trooper Manar] raises serious Constitutional rights questions and is not an appropriate police practice," the trial court ultimately concluded "that Defendants voluntarily consented to a search for evidence of an assault." The trial court speculated that "[p]ermission to search for evidence of an assault may well be a much narrower search than for drugs" because "[d]rugs

may be secreted in places that evidence of an assault would not likely be found." However, because the drugs in this case were found in plain view during this otherwise voluntary search for evidence of a sexual assault, the trial court concluded that the evidence was constitutionally obtained. The Court of Appeals affirmed,[1] holding simply that "the trial court was correct in denying Krause's request to suppress the evidence against him as the product of a warrantless search."

On appeal to this Court, the sole issue for our consideration is whether the consent given by Appellant and his roommate was constitutionally valid. In Cook v. Commonwealth, 826 S.W.2d 329 (Ky.1992), this Court stated that "consent is one of the exceptions to the requirement for a warrant." *Id.* at 331 (citing *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)). We further indicated that the "test for determining if consent is constitutional is set out in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)." *Id.*

In Schneckloth, supra, the Supreme Court held that "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means ... [f]or, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." Id. at 228, 93 S.Ct. at 2048. Whether consent is the result of express or implied coercion is a question of fact, id. at 227, 93 S.Ct. at 2048, and thus, we must defer to the trial court's finding if it is supported by substantial evidence. RCr 9.78.

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[1]Chief Judge Combs dissented from this opinion.

In this case, the trial court specifically found that Appellant and his roommate did not and would not give consent to search for drugs. Thus, Trooper Manar needed to procure consent to search for something else if he was to achieve his main objective. When he concocted a story regarding the rape of a young girl and his need to look around the house for the purpose of determining whether the young girl's description of their house was accurate, Appellant and his roommate ultimately agreed to allow a search for this specific purpose. Because Appellant's consent to this limited type of search was voluntary, the trial court reasoned that any plain view seizures of collateral criminality made during the search was a necessary product of this initial voluntary consent.

The premise of the trial court's ruling, of course, is the plain view doctrine. Under the plain view doctrine, a warrantless seizure of illegal substances or objects is constitutionally valid so long as the officer has not violated the Fourth Amendment "in arriving at the place where the evidence could be plainly viewed." Hazel v. Commonwealth, 833 S.W.2d 831, 833 (Ky.1992). In order to validate a "plain view" seizure, the Hazel Court explained that "not only must the officer be **lawfully located in a place** from which the object can be plainly seen, but he or she must have a **lawful right of access** to the object itself." Id. (emphasis added).

Pursuant to these standards, the trial court's ruling falters in the fact that Trooper Manar was only able to reach a location from which he could spy illegal drugs and related paraphernalia through machination. We addressed the use of ruses by police in Adcock v. Commonwealth, 967 S.W.2d 6 (Ky.1998). In Adcock, an officer disguised himself as a pizza

delivery person in order to coax a resident into opening the door for the purpose of executing a valid search warrant. Id. at 7. We held that "[t]he guiding factor in determining whether a ruse entry, to execute a search warrant, constitutes a 'breaking' under the Fourth Amendment should be whether the tactic frustrates the purposes of the 'knock and announce' rule." Id. at 10.[2]

The ruse in this instance was employed for the purpose of gaining consent (1) to make a warrantless entry into a home; and (2) to conduct a plain view warrantless search of the residence. Thus, the underlying purpose and policies in this case differ from the purpose and policies in the Adcock case. The guiding factor here is to determine whether this particular ruse frustrated the purpose of the constitutional requirement that consent to make a warrantless entry into and search of a home must be voluntary, and thus, free of implied or express coercion.

In Schneckloth, supra, the U.S. Supreme Court explained the purpose of the voluntariness requirement as follows:

> "[V]oluntariness" has reflected an accommodation of the complex values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might

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[2]Ultimately, we found that the tactic did not undermine the basic purpose of the rule. Id.

> wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

Id. at 225, 93 S.Ct. at 2046 (internal citations omitted). The Schneckloth Court further emphasized that "[i]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." Id. at 243, 93 S.Ct. at 2056 (internal quotation omitted).

In determining whether this particular ruse frustrated the purposes set forth above, we must make "a careful scrutiny of all the surrounding circumstances in a specific case." Cook, supra at 331. The Schneckloth Court advised that "account must be taken of subtly coercive police questions, as well as the possible vulnerable subjective state of the person who consents." Id. at 229, 93 S.Ct. at 2049. The Court further explained that no decision should turn "on the presence or absence of a single controlling criterion." Id. at 226, 93 S.Ct. at 2047.

In this case, Trooper Manar confronted Appellant and his roommate at an alarming hour (4:00 a.m.) with unnerving news-a young girl had just been raped and he needed to look around the house in order to determine if it was the place that she had described to police. Stunned and sure that they were not the perpetrators of this heinous crime (since in fact, it

never occurred), Appellant and his roommate made a split second decision to allow Trooper Manar into the residence in order to assist the trooper in his investigation. The trooper testified, and the trial court found that Appellant and his roommate would have never consented to the search if they knew the trooper's true purpose. Furthermore, Trooper Manar had no legal right, independent of receiving some kind of valid consent, to enter or search the home. Under these unique circumstances, we believe that the ruse utilized by Trooper Manar absolutely undermined the purposes inherent in requiring consent to be voluntarily obtained without any implied or express coercion.

Our belief that Appellant's consent to search was coerced is based on several factors. First, given the time and nature of the trooper's ruse, we believe that Appellant and his roommate were in a particularly vulnerable state. A knock on the door at 4:00 a.m. by uniformed police officers is a frightening event in and of itself. Couple this knock with a heinous and shameful accusation, such as the rape of a young girl, and nearly any person would feel overwhelmed and stunned.

Second, Trooper Manar's tactics were unnecessary in this instance and not based on any pressing or imminent tactical considerations. In contrast, the ruse utilized by the police in Adcock was primarily employed for safety reasons and to avoid the destruction of evidence that commonly takes place when entry into a home for the purposes of executing a search warrant is delayed or hindered.

Finally, we believe that if the type of ruse utilized by Trooper Manar was sanctioned by this Court, citizens would be discouraged from "aiding to the utmost of their ability in

the apprehension of criminals" since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them. Schneckloth, supra, at 243, 93 S.Ct. at 2056 (internal quotation omitted). Moreover, widespread use of this type of tactic could quickly undermine "the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness." Id. at 225, 93 S.Ct. at 2046.

We are careful to note that our holding is limited and narrow. We do not hold that the use of ruses, in general, is unconstitutional. The United States Supreme Court has long held that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." Sorrells v. United States, 287 U.S. 435, 441-42, 53 S.Ct. 210, 212, 77 L.Ed. 413, 416-17 (1932). Indeed, in Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) and Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), the Supreme Court held that the Fourth Amendment is not violated when police obtain incriminating information through the use of undercover agents who misrepresent their identity for the purpose of enticing defendants to confide or disclose wrongdoing. The use of undercover agents and stratagems in police investigations has long been sanctioned, and we do not question such a practice in this opinion. See, e.g., United States v. Baldwin, 621 F.2d 251, 252-253 (6th Cir.1980) ("[A]n [undercover] agent may legitimately gain entrance into a house by misrepresenting his identity."); Adcock, supra at 10 (entry into home for purposes of executing a search warrant by agent posing as pizza delivery person was constitutional); People v. LaGuerre, 29 A.D.3d 820, 815 N.Y.S.2d 211, 214 (N.Y.App.Div.2006) (no due

process violation when defendant voluntarily discarded chewing gum from which DNA sample was taken in the course of a police contrived "Pepsi Taste Test"); State v. Nedergard, 51 Wash.App. 304, 753 P.2d 526 (1988) (entry into home by undercover agents posing as interested buyers responding to "For Sale" sign was permissible means of establishing probable cause for a search warrant).

What distinguishes this case most, perhaps, from the bulk of other ruse cases is the fact that Trooper Manar exploited a citizen's civic desire to assist police in their official duties for the express purpose of incriminating that citizen. The use of this particular ruse simply crossed the line of civilized notions of justice and cannot be sanctioned without vitiating the long established trust and accord our society has placed with law enforcement. See United States v. Bosse, 898 F.2d 113 (9th Cir.1990) ("A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent."); United States v. Turpin, 707 F.2d 332, 334 (8th Cir.1983) ("Misrepresentations about the nature of an investigation may be evidence of coercion."); SEC v. ESM Government Securities, Inc., 645 F.2d 310, 316 (5th Cir.1981) ("We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust."); People v. Daugherty, 161 Ill.App.3d 394, 112 Ill.Dec. 762, 514 N.E.2d 228, 233 (1987) ("Where, as here, the law enforcement officer without a warrant uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises when, in fact, his real reason is to search

inside for evidence of a crime, we find that this deception under the circumstances is so unfair as to be coercive and renders the consent invalid."); State v. Schweich, 414 N.W.2d 227, 230 (Minn.App.1987) ("Tacit misrepresentation of the purpose of a search can rise to such a level of deception to invalidate the consent."); State v. McCrorey, 70 Wash.App. 103, 851 P.2d 1234, 1240 (1993) (distinguishing between undercover police activity and police acting in their official capacity actively misstating their purpose for gaining consent), abrogated on other grounds by State v. Head, 136 Wash.2d 619, 964 P.2d 1187 (1998); Commonwealth v. Haynes, 395 Pa.Super. 322, 577 A.2d 564, 572 (1990) (defendant's consent to be transported to the stationhouse was invalid because police deceived the defendant as to the true purpose of the trip); United States v. Giraldo, 743 F.Supp. 152, 154 (E.D.N.Y.1990) (defendant's consent was invalid where officer gained entry to home by claiming to be checking for a possible gas leak). Accordingly, we find that the deception employed by Trooper Manar in this case was so unfair and unconscionable as to be coercive and thus, Appellant's consent to a search of his residence was constitutionally invalid.

Because the record lacks sufficient evidence to support a finding of voluntary consent, the decision of the Court of Appeals is reversed, and Appellant's sentence and convictions are vacated. This matter is remanded to allow Appellant to withdraw his guilty pleas pursuant to RCr 8.09 and for further proceedings consistent with this opinion.

Lambert, C.J., Graves, Mcanulty, Minton, and Scott, J.J., Concur.
Wintersheimer, J., dissents in a separate opinion in which Roach, J., joins.

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SUPREME COURT OF KENTUCKY

2004-SC-1009-DG

FREDERICK CARL KRAUSE III APPELLANT

V. APPEAL FROM COURT OF APPEALS
03-CA-2092-MR
MCCRACKEN CIRCUIT NO. 03-CR-00162-002

COMMONWEALTH OF KENTUCKY APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I must respectfully dissent from the majority opinion because it misinterprets the clear statement of the circuit judge which found that the police were given consent to search. The order denying the motion to suppress evidence entered on July 25, 2003 clearly states that the defendants gave consent for the police to search for evidence of an assault.

The fact that the police intent was to search for drugs did not render the consent constitutionally invalid. The police ruse did not coerce them into consenting to a search. The defendants could have refused consent for a search of whatever nature but chose not to.

Clearly this Court has chosen to substitute its version of the facts for that of the original trier of the facts. I believe such a substitution is impermissible.

The entry by the trooper and the subsequent search of the residence was proper because of the voluntary consent and the use of a ruse or deception was justified under all the circumstances.

The question of voluntary consent turns on the careful scrutiny of all the surrounding circumstances of any particular case. Cook v. Commonwealth, 826 S.W.2d 329 (Ky.1992). In Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the United States Supreme Court held that the validity of a purported consent to search was to be determined by a voluntariness test similar to that which has been used by the court in coerced confession cases. It is a question of fact to be determined from all of the circumstances. See also 3 LaFave, Wayne R., Search and Seizure: A Treatise on the Fourth Amendment § 8.2 (3d Version, 1996).

Although deception by employment of a ruse is not condoned by the courts, the limited use of such a device is supported by many cases not only in Kentucky, but also through the nation. Adcock v. Commonwealth, 967 S.W.2d 6 (Ky.1998) held that a ruse used by police to gain entry for the purpose of executing a search warrant, so long as it is accomplished without the use of force, promotes the underlying purpose of the Knock and Announce Rule, and is thus constitutional and reasonable under the Fourth Amendment.

The majority opinion seeks refuge in the Schneckloth reference to "possible vulnerable subjective state of the person who consents." Such vulnerability is clearly misplaced. Krause, then 29-years-of-age, was a person of

above average intelligence who was a director at a local television station. He is a college graduate. He surely knew he had the right to allow the officer to search without a warrant. The entire incident was triggered by a tip from a subject arrested by the trooper earlier which directed the officer's attention to the home on 19th Street.

Persuasive authority can be found in Commonwealth v. Morrison, 275 Pa.Super. 454, 418 A.2d 1378 (1980), in which the consent to search was voluntary even though procured by police who misrepresented both identity and purpose. State v. Hastings, 119 Wash.2d 229, 830 P.2d 658 (1992), allowed warrantless entry made after consent was given as valid despite the use of a ruse; State v. Nedergard, 51 Wash.App. 304, 753 P.2d 526 (1988), held that an undercover officer's use of a ruse to enter the residence of a suspect by posing as an interested buyer responding to a for sale sign was permissible as a means of establishing probable cause for a search warrant. People v. Manieri, 83 Misc.2d 798, 373 N.Y.S.2d 504 (1975), stated that consent of a hospital patient in a private room for entry was not vitiated as to police acting in an undercover capacity as a porter. Other cases following the same general line of the use of deception as Reese are: Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); United States v. Caceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), and United States v. Baldwin, 621 F.2d 251 (6th Cir.1980); Commonwealth v. Ginter, 289 Pa.Super. 9, 432 A.2d 1024 (1981). As noted earlier, the voluntariness test for analyzing consent was adopted from the cases involving coerced confessions. The mere use of a ruse or a strategic deception does not render a confession involuntary so long as

the deception does not rise to the level of coercion. See Springer v. Commonwealth, 998 S.W.2d 439 (Ky.1999) citing Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

When the police deception as to the purpose of the search is used in obtaining the consent to search, each case must be analyzed with regard to the surrounding circumstances. United States v. Watson, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

Several jurisdictions have specifically approved the use of deception by police to gain consent to search. In State v. Johnson, 253 Kan. 356, 856 P.2d 134 (1993), the police used deception to obtain consent to search the home of the defendant. The officers misrepresented to the defendant that they were looking for a parole violator when they were actually seeking evidence regarding the murder of the victim. In People v. Zamora, 940 P.2d 939 (Colo.App.1996), the officers used a ruse stating that they just wanted a quick look at the apartment of the defendant in regard to a domestic dispute in an adjacent apartment. The officers were actually trying to investigate whether the apartment matched the sexual assault victim's description of the apartment to which she had been taken. The Colorado court determined that consent to search may be voluntary even when the person giving consent is not aware of or is misinformed as to the purpose of the search. The consent by the defendant was a product of his own free will and intelligently made and the defendant knew he had a right to refuse entry. The Court concluded that the deception alone does not invalidate consent but is one factor to be considered in the totality of circumstances.

In People v. Avalos, 47 Cal.App.4th 1569, 55 Cal.Rptr.2d 450 (1996), police stopped the defendant and told him that he had been stopped as part of a burglary investigation. The officer stated that he wanted to search the truck of the defendant for stolen property in addition to some other contraband. Actually the investigation was in regard to narcotics. The Court determined that police properly identified themselves and permitted the search based on the total circumstances and concluded that the consent was voluntary.

Here, the officer told Yamada and Krause that he was looking for evidence of an assault. In attempting to gain entry to search, the officer stated that he wanted to look under the bed, bedspread and furniture around the house to see if it was consistent with the description given by the alleged assault victim. Yamada should have clearly realized that he had incriminating evidence in his room because he wanted to go back to the room and clean it up before the search. When the officer, with the consent of Yamada, accompanied him to his room, Yamada quickly tried to hide the incriminating evidence behind his back. One of the items was a spoon and Yamada told the officer that the substance on the spoon was cocaine. Upon additional questioning, Yamada handed over a bag of cocaine from his robe and stated that was all the drugs in the home.

The officer also asked if he could search Krause's room, and the trial judge found that the evidence indicated that Krause consented to the search of his room. This was a separate and distinct consent which was found to be voluntary. Under any circumstances, the subsequent search

and seizure of the contraband from the room occupied by Krause was valid.

The circumstances of this matter indicated that the officer had a tip that a person unknown to him had purchased cocaine from Yamada at the residence several hours before the search. The officer identified himself as a police officer, was in uniform and never tried to conceal his identity. His conduct was never threatening or coercive. He never feigned an emergency or exceeded the scope of the consent.

Krause testified at the suppression hearing that he answered the door and he knew that the officer needed a warrant and that he could say no when they asked to come into the house. The evidence indicates that neither resident was uncooperative in giving any consent. The trial judge found that the evidence indicated that Krause consented to the search of his room.

The surrounding circumstances were essentially that the officer had a tip that a person unknown to him had purchased cocaine from Yamada at the residence several hours before the search. The officer was in full uniform and identified himself as a police officer. His behavior was not threatening or coercive.

Krause had prior contact with law enforcement because he had been convicted of possession of marijuana and drug paraphemalia. He was in his late-20s with a college education and worked as a television producer at a local station. Clearly, he was above average intelligence and had experience in the area. Krause also stated that he was not doing drugs that evening. Several of the cases cited in support

of the majority opinion's position are based on mere conjecture or speculation. Here, the officer had probable cause to believe that the person he was attempting to arrest was in the apartment and he could legitimately enter the premises by means of a deception. Cf. United States v. Phillips, 497 F.2d 1131 (9th Cir.1974).

Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), held that a search cannot be justified when the consent has been given only after the official conducting the search has asserted that he possessed a warrant. Justice Stewart held that when a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. Where there is coercion, there cannot be consent. That is not the situation presented in this case. This case involved rape and two charges of felonious assault and whether a rifle was introduced into evidence as a result of improper search. The Bumper ruse was indeed a coercive technique. That individual believing that the officer had a warrant, believed that he did not have the ability to refuse. Krause was not in that position. He or his drug dealer roommate could easily have told the officer to leave. It is almost beyond belief that any drug dealer with illegal drugs in an apartment would not resist to the utmost anything other than a search warrant before letting law enforcement in the premises.

Under all the circumstances, I believe that consent was given and that this judgment of conviction should be affirmed in all respects.

Roach, J., joins this dissent.

SUPREME COURT OF KENTUCKY
2004-SC-1009-DG

FREDERICK CARL KRAUSE, III APPELLANT

V. ON REVIEW FROM THE COURT OF APPEALS
2003-CA-2092-MR
MCCRACKEN CIRCUIT COURT NO. 03-CR-000162

COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing is denied.

All concur, except Wintersheimer, J., who would grant rehearing.

ENTERED: December 21, 2006

s/_____
CHIEF JUSTICE

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2003-CA-002092-MR

FREDERICK "FRITZ" CARL KRAUSE, III APPELLANT

V. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00162

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES. TACKETT, JUDGE Fredrick Krause III appeals from an order of the McCracken Circuit Court denying his motion to suppress evidence seized from his residence without a search warrant. At issue is whether an officer who uses a ruse can obtain valid consent to search, thus negating the requirement of a search warrant. We find that the search did not violate Krause's rights to be free from unreasonable search and seizure because the officer's deception as to the intent of the search did not coerce Krause or his roommate, Joe Yamada, into giving consent to search.

Krause was indicted on charges of first-degree possession of a controlled substance (cocaine), possession of drug paraphernalia second offense, and possession of marijuana. The evidence which led to charges against Krause was

gathered during a warrantless search of the home he owned and shared with Yamada. Krause moved the trial court to suppress the evidence, arguing that the officers did not have valid consent to search the house. At the suppression hearing, Krause testified that he answered the door on March 18, 2003, and found three uniformed police officers on his doorstep. Kentucky State Police Trooper Jason Manar informed Krause that a young girl had accused Yamada of sexually assaulting her that evening inside the residence. Krause told the officers that he was not Yamada, but that he would go and get Yamada from inside the house. He testified that, even though he shut the door behind him, the officers followed him into the house where they encountered Yamada. After hearing the fabricated assault accusation, Yamada gave police permission to search the house, and they found a controlled substance and drug paraphernalia in Yamada's bedroom. Additional drug paraphernalia were located in the living room. Krause testified that police searched his bedroom without his consent and found a controlled substance. Police then arrested both Krause and Yamada.

Manar also testified at the suppression hearing. According to the trooper, he arrested an unknown person earlier in the day who was found to be in possession of a quantity of cocaine. The arrestee stated that he had purchased the cocaine from Yamada and gave the trooper the address of the residence where the transaction occurred and a description of the vehicle in front of the house. Instead of obtaining a search warrant, Manar went to the residence in the middle of the night accompanied by another trooper and a McCracken County Sheriff's Deputy. Manar testified that he thought it unlikely that Yamada would consent to a warrantless search

for drugs so he invented an alleged sexual assault and asked whether he could look at the furniture and bedding to determine whether it matched the description given by his fictitious victim.

Although Manar was uncertain, he testified that he thought Yamada himself answered the door. He testified that Yamada and Krause consented to the officers entering the house. Manar stated that he obtained consent to actually search by telling the occupants the fabricated assault story. According to Manar, after drugs were found in Yamada's bedroom, Krause gave consent for a search of his own room. He admitted that he did not tell Yamada and Krause that he was searching for drugs until after he had actually carried out the search.

The trial court found that, although Manar unquestionably lied in obtaining it, Yamada and Krause gave voluntary consent to the search of their residence. After the trial court denied his motion to suppress the evidence seized from the warrantless search of his house, Krause entered a conditional guilty plea to the charges against him subject to his right to appeal the trial court's ruling on the suppression issue. Krause was sentenced to five years on each of the felony charges and twelve months on the misdemeanor with the felonies to run consecutively for a total of ten years probated for two and one-half years. This appeal followed.

Although he phrases it as several different issues, Krause's basic argument is that Manar did not obtain valid consent to search the home he shared with Yamada because the trooper lied about the type of evidence he was seeking. Kentucky Rule of Criminal Procedure 9.78 addresses the procedure for suppressing evidence as follows:

If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities or (b) the fruits of a search, the trial court shall conduct an evideniary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

In addition, the question of whether consent to search is voluntary must be determined by a careful examination of the all of the facts in a specific case. Cook v. Commonwealth, Ky., 826 S.W.2d 239 (1992). The trial court's order denying Krause's suppression motion contained the following findings of fact and conclusions:

... Trooper Manar arrested a person for possession of cocaine. The person, who was not identified at the hearing, was unknown to Trooper Manar. The person stated to Trooper Manar that he purchased the cocaine from Defendant Yamada at his residence at 523 South 19th St. in Paducah. Trooper Manar believed that he did not have probable cause for a search warrant and decided to go to the residence to see if the occupant(s) would consent to a search. [Trooper] Manar did not believe they would consent to a search for drugs.

Trooper Manar proceeded to the residence several hours later, in the very early morning hours. He was accompanied by one or two other policemen. One of the defendants, most likely Krause, answered the Trooper's knock at the door. Believing that the residents would not consent to a search for drugs, the trooper fabricated a false story that he believed would more likely result in the residents' consent to search. Trooper Manar stated that a young female had reported being assaulted by Yamada and asked if they could search the residence for evidence of the assault. Contrary to Defendants' positions, the Court finds that the police were given consent to search. Pursuant to the consent, cocaine, marijuana, and paraphernalia were found and the Defendants arrested.

Defendants argue that if consent was given it was not valid consent because of the ruse which the police used to gain entry.... The Court finds that the ruse employed raises serious Constitutional rights questions and is not an appropriate police practice. After much thought and perusal of the relevant cases, however, the Court finds that, given these facts, the ruse did not improperly coerce or otherwise result in other than a constitutionally valid consent to search.

A primary concern is whether the police action here used might be used to randomly search a person's home with nothing more than curiosity or unsupported suspicion. Trooper Manar's suspicion that criminal activity was afoot in the residence was supported by more than mere conjecture. Hours earlier, he had arrested a person in possession of

> cocaine. The person related that he had purchased the cocaine from the Defendants' residence. There was, therefore, reasonable suspicion that illicit drugs would be found in the residence.
>
> A second concern is whether Defendants' consent to search was ... voluntary so as to be an exception to the Constitutional requirement of a search warrant.... The issue is: When the police falsely tell a resident that they wish to search for evidence which they know does not exist, in order to search for evidence they have a reasonable suspicion does exist, is the resident's consent based upon the subterfuge a ... voluntary consent?
>
> The Court finds that Defendants voluntarily consented to a search for evidence of an assault. The fact that the actual police intent was to search for drugs did not render the consent Constitutionally invalid.
>
> One search was no more intrusive than the other. It was the stated purpose that was the difference. Police deception did not coerce them into consenting to a search. Defendants could have refused consent for a search of whatever nature, but chose not to.

We agree with the trial court's factual finding that Manar did obtain consent to search the residence shared by Yamada and Krause. Moreover, since that consent was obtained without any threat or express or implied coercion, it was valid. Cook At 331. Thus, the trial court was correct in denying Krause's request to suppress the evidence against him as the product of a warrantless search.

For the foregoing reasons, the decision of the McCracken Circuit Court is affirmed.

BUCKINGHAM, Judge, Concurs.

COMBS, Chief Judge, Dissents.

COMBS, Chief Judge, Dissenting. There was no legitimate reason (*i.e.*, no exigent circumstances or any other exception to the warrant requirement) to justify the decision of the officers not to have obtained a search warrant prior to this middle-of-the night search. The police received an uncorroborated tip at night. There was no likelihood that the evidence was in any jeopardy of being destroyed before they could have obtained a search warrant.

The fact that the police concocted a ruse involving a false accusation of sexual assault in order to obtain consent severely vitiates the requisite voluntariness of the consent under the extreme circumstances of this case. Therefore, I would hold that the consent was not valid and that a warrant should have been sought.

The trial court struggled with the disturbing "constitutional rights questions" in this case. I cannot resolve those concerns merely because criminal activity was found after the fact of the search. The deceptive inducement to coerce consent in this case is a disturbing and precedentially dangerous threat to the essence and integrity of the Fourth Amendment. It is the very kind of intrusion for which the Fourth Amendment requires a warrant.

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COMMONWEALTH OF KENTUCKY
McCRACKEN CIRCUIT COURT
DIVISION NO. II
INDICTMENT NO. 03-CR-00162-001
and
INDICTMENT NO. 03-CR-00162-002

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **ORDER DENYING MOTION TO SUPPRESS EVIDENCE**

JOE YAMADA DEFENDANTS
and FREDERICK CARL KRAUSE, III

This matter is before the court of the Defendants' motions, through Counsel, to suppress evidence discovered by police in a warrantless search of their residence. Because the search was pursuant to a valid consent to search the search was not in violation of the Defendants' Constitutional rights.

A suppression hearing was held in which Trooper Manar of the KSP and Defendant Krause testified. The Court finds the following based upon the credible evidence

presented. Trooper Manar arrested a person for possession of cocaine. The person, who was not identified at the hearing, was unknown to Trooper Manar. The person stated to Trooper Manar that he purchased the cocaine from Defendant Yamada at his residence at 523 South 19th St. in Paducah. Trooper Manar believed he did not have probable cause for a search warrant and decided to go to the residence to see if the occupant(s) would consent to a search. Tr Manar did not believe they would consent to a search for drugs.

Trooper Manar proceeded to the residence several hours later, in the very early morning hours. He was accompanied by one or two other policemen. One of the defendants, most likely Krause, answered the Trooper's knock at the door. Believing that the residents would not consent to a search for drugs, the trooper fabricated a false story that he believed would more likely result in the residents' consent to search. Trooper Manar stated that a

young female had reported being assaulted by Yamada and asked if they could search the residence for evidence of the assault. Contrary to Defendants' position, the Court finds that the police were given consent to search. Pursuant to the consent, cocaine, marijuana, and paraphernalia were found and the Defendants arrested.

Defendants argued that if consent was given it was not valid consent because of the ruse which the police used to gain entry. The Commonwealth filed a brief in opposition to the motion to suppress citing cases supporting its position. The Defendants, through Counsel provided arguments and supporting cases for their position. The Court finds that the ruse employed raises serious Constitutional rights questions and is not an appropriate police practice. After much thought and perusal of the relevant cases, however, the Court finds that, given these facts, the ruse did not improperly coerce or otherwise result in other than a Constitutionally valid consent

to search.

A primary concern is whether the police action used here might be used to randomly search a person's home with nothing more than curiosity or unsupported suspicion. Trooper Manar's suspicion that criminal activity was afoot in the residence was supported by more than mere conjecture. Hours earlier he had arrested a person in possession of cocaine. The person related that he had purchased the cocaine from the Defendants' residence. There was, therefore, reasonable suspicion that illicit drugs would be found in the residence.

A second concern is whether Defendants' consent to search was knowing and voluntary so as to be an exception to the Constitutional requirement of a search warrant. Trooper Manar told the Defendants he wished to search for evidence of an assault. He knew there would be no such evidence because he knew there was no assault. His intention was to

CLERK'S CERTIFICATE

The foregoing Order was entered on this 28th day of July, 2003, and copies mailed to:

Commonwealth Attorney
Hon. Delbert K. Pruitt
Hon. Ian Jeremy Smith

MIKE LAWRENCE, CLERK
McCRACKEN CIRCUIT COURT

BY: s/_____

COMMONWEALTH OF KENTUCKY
MCCRACKEN CIRCUIT COURT
DIVISION NO. II
INDICTMENT NO. 03-CR-00162-002

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **FINAL JUDGMENT/SENTENCE OF PROBATION**

FREDERICK "FRITZ" CARL KARUSE, III DEFENDANT

The Defendant having been found guilty by the Court of the crimes of Count 1 - First Degree Possession of a Controlled Substance - Cocaine; Count 2 - Use/Possession of Drug Paraphernalia, Second Offense; and Count 3 - Possession of Marijuana; and the Court noted of record no recommendation had been made by the Commonwealth as to sentence.

On the 25th day of September, 2003, the Defendant appeared in open court with his attorney, Hon. Jeremy Smith, and the Court inquired of the Defendant and counsel whether they had any legal cause why judgment should not be

pronounced and afforded the Defendant an opportunity to make any statements in the Defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Defendant and counsel having examined said report and having made objections and/or corrections thereto, which were duly noted by the Court, and having further reviewed the recommendations of the Commonwealth.

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant is found guilty of the crime of Count 1 - First Degree Possession of a Controlled Substance - Cocaine; Count 2 - Use/Possession of Drug Paraphernalia, Second Offense; and Count 3 - Possession of Marijuana; and it is further **ORDERED** and **ADJUDGED** that the Defendant is sentenced to Count 1 - five (5) years, Count 2 - five (5) years,

and Count 3 - twelve (12) months, with Counts 1 and 2 to run consecutive to each other and to run concurrent with sentence on Count 3, for a total of ten (10) years, with the Defendant being **ORDERED** to serve three (3) days and the remainder to be probated for a period of two and one-half (2-1/2) years under the conditions specified below.

1. Continued good behavior.

2. Refrain from violating the law in any respect.

3. Report in person at least once each month to the probation officer;

4. Comply with the regulations of the Division of Probation and Parole and the directions of the probation officer;

5. Pay $30.00 monthly supervision fee; and

6. Undergo drug and alcohol assessment, including a follow through with any necessary counseling and/or treatment.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant.

IT IS ORDERED that upon completion of the aforesaid probationary period, the Defendant shall be finally discharged, provided the Defendant has complied with the above conditions and provided further that no warrant issued with the Court is pending against the Defendant, and Defendant's probation had not been revoked. Upon revocation, the Defendant will be required to serve ten (10) years in incarceration, less three (3) days pre-sentence confinement credit.

The Court finds that the Defendant has received effective assistance of counsel.

IT IS HEREBY ORDERED that the Defendant shall be given credit for pre-sentence confinement time of three (3) days. It is noted that the Defendant's date of birth is the 7th

day of September, 1973. Court costs and fees in the amount of $125.00 shall be paid immediately.

FURTHER, any bond posted may be released upon entry of this Order.

ENTERED from the Bench September 25, 2003, and **DATED** this 29 day of September, 2003.

s/_____
CRAIG Z CLYMER, JUDGE
McCracken Circuit Court
Division No. II

CLERK'S CERTIFICATE

The foregoing Judgment was entered the 29th day of September, 2003, and copies were mailed to:

Commonwealth Attorney
Hon. Jeremy Smith
Probation & Parole

MIKE LAWRENCE, CLERK
McCRACKEN CIRCUIT COURT

BY: s/_____

FILED
MAY 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1281

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

FREDERICK CARL KRAUSE, III,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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May 2007

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Supreme Court of Kentucky erred in finding that Respondent's consent to a warrantless search was not voluntary, based on the court's application of the totality of the circumstances test to the facts of this case.

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RULE

Supreme Court Rule 10 1

Petitioner alleges a wide-ranging division among the lower federal and state courts about whether the Fourth Amendment permits police officers to misrepresent their purpose to obtain consent to a warrantless search. This division does not exist. Rather, the courts agree that, as a general matter, police may use a ruse and that the question whether any particular ruse is permissible depends on the specific facts of each case.

Below, the Kentucky Supreme Court agreed with Petitioner that the Constitution does not forbid use of a ruse to obtain consent but found that "this particular ruse," Pet. App. 5, 6, 9, went too far, in light of the totality of the circumstances. Thus, what Petitioner is really challenging is the Kentucky court's application of the law—as to which all parties agree—to the facts of "this particular ruse." Disagreement on that case-specific question is not worthy of the Court's review. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

STATEMENT OF THE CASE

Factual Background

Respondent Frederick Krause lived in a house in Paducah, Kentucky, with a roommate named Joe Yamada. On the evening of March 17, 2003, Kentucky State Police Trooper Jason Manar arrested a man for possession of cocaine. The man said that he had bought the drug from Yamada at Yamada's house in Paducah. "Instead of obtaining a search warrant, Manar went to the residence in the middle of the night accompanied by another trooper and a McCracken County Sheriff's Deputy." Pet. App. 21.

Manar did not think that the residents of the house would consent to a search for drugs. Therefore, he "fabricated a false story that he believed would more likely result in the

residents' consent to search." *Id.* at 29. After Krause answered the door, Manar falsely said that a young girl had just reported being raped by Yamada at the house, and Manar asked whether he could look around the house to see if the girl had accurately described the furniture and bedspreads. *Id.* at 2. When Krause went to get Yamada, Manar and the two other officers followed him into the house. *Id.* at 21. Yamada agreed to let the troopers look around the house to confirm the inaccuracy of the (fictitious) girl's rape allegation. The troopers then found cocaine and marijuana in the house. "[Manar] admitted that he did not tell Yamada and Krause that he was searching for drugs until after he had actually carried out the search." *Id.* at 22.

Krause was indicted on possession of drugs and drug paraphernalia. He moved to suppress the evidence seized from the warrantless search of his home. After the trial court denied the motion, he entered a conditional plea to the charges, subject to an appeal of the ruling on the motion to suppress. The Kentucky Court of Appeals affirmed. *Id.* 26.

Decision Below

The Kentucky Supreme Court reversed, holding that the motion to suppress should have been granted. The court explained that, under its case law, it "must make a careful scrutiny of all the surrounding circumstances in a specific case." *Id.* at 6 (citation omitted). The court then looked to "the time and nature of the trooper's ruse"—a 4:00 a.m. knock on the door by two officers saying that a young girl had just reported being raped by Yamada in their house. *Id.* It noted that the "tactics were unnecessary in this instance and not based on any pressing or imminent tactical considerations," such as safety reasons or to avoid the destruction of evidence. *Id.* The court also considered that the type of ruse at issue would discourage citizens from "'aiding to the utmost of their ability in the

apprehension of criminals' since they would have no way of knowing whether their assistance was being called upon for the public good or for the purpose of incriminating them." *Id.* at 7-8 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973)).

The Kentucky Supreme Court recognized that this Court "has long held that '[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises.'" *Id.* (quoting *Sorrells v. United States*, 287 U.S. 435, 441-42 (1932)). And the court explicitly did "not hold that the use of ruses, in general, is unconstitutional." *Id.* at 8. Although the court held that the facts in this case rendered the search unconstitutional, it was "careful to note that [its] holding is limited and narrow," *id.*, applying to "this particular ruse," *id.* at 5, 6, 9, under "these unique circumstances," *id.* at 7.

REASONS FOR DENYING THE WRIT

A. The Decision Below Does Not Conflict With The Decisions Of Any State Or Federal Appellate Court.

Petitioner claims a "wide split among the state and federal courts" on the question "whether the police may employ deception with regard to their purpose [to] obtain voluntary consent to search." Pet. 11. No such split exists. In fact, the lower courts agree both that ruses are, as a general matter, a permissible means of obtaining consent, and also that whether consent attributable to any particular ruse was voluntary depends on the totality of the circumstances in each particular case. The decision below is entirely consistent with this line of cases.

Although the petition is replete with case citations purporting to illustrate a division of authority, most of the cases cited do not involve a ruse as to the purpose for which the

police requested consent to a warrantless search. Of those that do involve such a ruse, none conflicts with the decision below. Like that decision, the cases cited in the Petition look to the totality of the circumstances to make determinations based on the facts of each case.

1. As might be expected when the courts are engaging in fact-intensive determinations, some warrantless searches involving ruses are upheld and others are not. Yet the courts consistently apply the same legal test—the totality of the circumstances test. The cases show no conflict or confusion warranting review.

Only one case cited by Petitioner involves circumstances, like those here, in which the police officers completely misrepresented both what they were searching for and why. Both the approach and holding of that decision are consistent with the decision below. *See People v. Daugherty*, 514 N.E.2d 228, 232, 233 (Ill. App. Ct. 1987) (looking to "totality of the circumstances," consent invalid where, to gain consent to enter, police claimed to be investigating theft previously reported by defendant but sole purpose was to search for marijuana); *cf. State v. McCrory*, 851 P.2d 1234, 1240 (Wash. Ct. App. 1993) (officer exceeded scope of consent when, after officer promised defendant that he would not be arrested if he allowed officer to enter, officer promptly arrested defendant).

In another state intermediate court decision cited, *State v. Schweich*, 414 N.W.2d 227 (Minn. Ct. App. 1987), the officers truthfully stated one object of their search, but not the other. The analysis and holding of this case are also consistent with the decision below. In *Schweich*, the defendant had called the police to report that he had been threatened with a gun by the boyfriend of his upstairs neighbor. *Id.* at 228. After the

police arrived, they obtained his and his neighbor's consent to search their homes for the gun. The officers also intended to look for drugs, but they did not tell that to the defendant when they asked his consent to search. *Id.* at 230. After finding the gun, one officer took the defendant to the police station to give a statement. Meanwhile, another officer continued to search the defendant's apartment for drugs, which he found inside a small zipped compartment in a scuba diving bag. *Id.* at 229. The defendant moved successfully to suppress the evidence of the drugs as based on an unlawful search. On appeal by the state, the court considered various factors, such as that consent was obtained through misrepresentation about the intended scope of the search, and that the defendant was not informed that he was under investigation when he gave consent, was not present tacitly to approve an expanded search, and had "no idea" that the search was ongoing when he left for the police station to give a statement with respect to the gun threat. *Id.* Given "the totality of the circumstances," the appellate court upheld the trial court's finding that the consent was invalid. *Id.* at 230, 231.

Although so few "ruse" cases cited by Petitioner involve misrepresentations as to the object of the search, dicta in some of the other cases address this circumstance. Those dicta agree that such a misrepresentation weighs against a finding of voluntary consent. *See United States v. Bosse*, 497 F.2d 113, 115 (9th Cir. 1990); *United States v. Briley*, 726 F.2d 1301, 1304 (8th Cir. 1984); *United States v. Ressler*, 536 F.2d 208, 211 (7th Cir. 1976).

Other federal circuit and state high court "ruse" cases cited by Petitioner involve circumstances in which the officers truthfully stated *what* they were looking for, but not *why*. This sort of ruse is different from the one at issue in the decision below, but the legal analysis is the same and suggests no

inconsistency. In each case, the courts assessed the legality of the search based on the totality of the circumstances.

For example, in *State v. Johnson*, 856 P.2d 134 (Kan. 1993), the police obtained consent to search the defendant's home to look for a man named Boyce by saying that Boyce was wanted for a parole violation. That reason was untrue; the police wanted to look for Boyce because they were concerned for his safety. The defendant later argued that the ruse invalidated his consent. After specifying numerous factual circumstances that weighed in favor of and against a finding that consent was voluntarily given, the court upheld the search based on the totality of the circumstances. *Id.* at 140, 141.[1]

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[1]Federal circuit court cases cited by Petitioner in which police officers revealed the true object of their search but not the true reason include *United States v. Davis*, 749 F.2d 292, 296 (5th Cir. 1985) (search upheld based on totality of circumstances where officers did not disclose to defendant all purposes for their search for guns, but defendant knew that officers were looking for guns); *United States v. Andrews*, 746 F.2d 247, 248, 251 (5th Cir. 1984) (search upheld in "narrow" decision "under the facts of this case," where agent asked to see defendant's shotgun by saying that defendant fit description of person who committed various robberies, but real reason agent wanted to see gun was to establish illegal possession of firearm by a felon); and *Brown v. Brierley*, 438 F.2d 954, 959 (3d Cir. 1971) (where defendant gave officer his gun because officer had offered to sell gun for defendant, and officer did sell gun but then borrowed it from new owner to run ballistics test, defendant's relinquishment of gun was not unlawful search and seizure). *See also People v. Zamora*, 940 P.2d 939, 943-44 (Colo. Ct. App. 1996) (totality of circumstances supported

(continued...)

The cases recognize that there are situations in which a misrepresentation about the purpose of a search is not enough to vitiate consent. In this case, however, the police appeared at Krause's and Yamada's home at 4:00 in the morning, falsely told them that Yamada had been accused of an exceptionally serious crime, and implicitly suggested that they could disprove the charge by letting the police inside the house to see that the victim's description was inaccurate—factual circumstances that would have an obvious tendency to overwhelm anyone's ability to make an uncoerced choice.

2. The majority of the cases cited by Petitioner are inapposite. First, like Petitioner, *see* Pet. 13, and the Kentucky Supreme Court, Pet. App. 5, the lower courts consistently recognize that *Schneckloth* established that a "totality of the circumstances" test is the proper standard for assessing whether consent to a warrantless search was voluntary. Petitioner offers a list of some of the factors that courts have considered in applying this test. *Id.* at 22-23. Although the cases cited address challenges to the voluntariness of consent, not one involves a ruse. *See* cases cited at Pet. 22-23.

Second, in many other cases cited in the Petition, the defendants challenged warrantless searches by arguing that the involvement of undercover officers vitiated any consent. The

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[1](...continued)
voluntariness of consent where officers truthfully stated that they wished to see layout of apartment but misrepresented the crime they were investigating); *People v. Avalos*, 55 Cal. Rptr. 2d 450, 455-56 (Cal. Ct. App. 1996) (search upheld where police obtained consent to look in truck for stolen property and "other contraband," but only real object of search was "other contraband").

decisions uniformly hold that the involvement of an undercover officer is an acceptable "ruse" that does not vitiate consent. *See, e.g., Lewis v. United States*, 385 U.S. 206 (1967); *United States v. Scherer*, 673 F.2d 176 (7th Cir. 1982); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994); *cf. United States v. Bosse*, 898 F.2d at 115 (undercover or "surreptitious" entry must be limited to purposes contemplated by suspect, and undercover officer may not "conduct a general search for incriminating materials") (quoting *Lewis*, 385 U.S. at 211). The decision below expressly "do[es] not question" the use of undercover officers. Pet. App. 8.

Third, Petitioner relies on four cases addressing the voluntariness of a confession. Although the test for assessing voluntariness of a confession is similar to the test for assessing consent to a warrantless search, the confession cases cannot demonstrate a split among the lower courts because, not only do they not address the question presented by Petitioner or even involve warrantless *searches*, but three of the decisions are from *this* Court. *See Illinois v. Perkins*, 496 U.S. 292 (1990); *Colorado v. Spring*, 479 U.S. 564 (1987); *Frazier v. Cupp*. 394 U.S. 731 (1969); *Commonwealth v. Haynes*, 577 A.2d 564 (Pa. Super. 1990), *all cited at* Pet. 22.

Finally, Petitioner incorrectly claims that the law in the Sixth and Eighth Circuits is internally inconsistent. Pet. 18. As to the Eighth Circuit, Petitioner's first citation is to a case in which consent to search was obtained without any ruse at all, and the consent was upheld in a "narrow" holding based on the "totality of the circumstances." *See Briley*, 726 F.2d at 1305 ("The officers' cryptic statement that they had important matters to discuss with Briley does not appear to have been said with the intention of tricking [his girlfriend] into consenting to an entry."). Its other citation is to a case in which an undercover officer, using the pretext of car trouble, asked the

defendant to open his door and from the doorway was able to see drug and drug paraphernalia in plain view. *See United States v. Wright*, 641 F.2d 602, 603 (8th Cir. 1981). As in *Briley*, the search in *Wright* was upheld. The holdings in these two decades-old cases are fully consistent, both with one another and with the law in other jurisdictions.

Likewise, Petitioner cites two cases from the early 1908s to show inconsistency in the Sixth Circuit. One case is a brief decision rejecting a Fourth Amendment challenge to the admission of drug evidence obtained by an undercover officer. *United States v. Baldwin*, 621 F.2d 251, 253 (6th Cir. 1980). In the other, five officers obtained "consent" to enter the home of defendant's friend by banging on the door, with guns drawn, hollering "Police, open the door," and stating that they had a warrant, which suggested a search warrant when in fact they had an arrest warrant. "Viewing the 'totality of the circumstances,'" the court held that the consent was not voluntary. *United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981) (quoting *Schneckloth*, 412 U.S. at 227). The outcome in *Jones* was the opposite of that in *Baldwin*—one search was invalidated and the other allowed—but there is no inconsistency in the analyses or holdings of the two cases.

B. The Answer To Petitioner's Question Presented Is Unlikely To Affect The Outcome Of This Case.

The question presented by Petitioner is whether consent to a warrantless search can be deemed voluntary when the police use a ruse regarding their purpose to obtain that consent. The answer to this question is very unlikely to affect the outcome of this case. If a ruse as to purpose is *never* permissible, then the decision below would be affirmed because the court below held that the ruse in this particular case was not permissible. On the other hand, if a ruse as to purpose is

sometimes permissible, depending on the facts presented, then the decision below would still be upheld because the court below agreed that ruses can sometimes be okay: Its "limited and narrow" holding, Pet. App. 8, was that "this particular ruse," *id.* at 5, 6, 9, in "these unique circumstances," *id.* at 7, "crossed the line." *Id.* at 9.

The Court's answer to Petitioner's question would affect the outcome here only if the Court were to hold that a ruse as to purpose categorically cannot affect the voluntariness of consent and is not a permissible factor for courts to consider when evaluating the totality of the circumstances to determine voluntariness. That answer, however, is extremely unlikely because this Court has already instructed that the totality of the circumstances test is the proper approach to evaluating consent to a warrantless search. *Schneckloth*, 412 U.S. at 229. And in doing so, the Court rejected the notion that the "presence or absence of" any particular factor should be controlling. *Id.* at 226, 229. Moreover, no case cited by Petitioner supports the argument that a ruse as to purpose is not a permissible consideration, among others that make up the totality of the circumstances. Indeed, Petitioner itself does not make this argument.

In short, as long as the use of a ruse to obtain consent to a search is a proper factor to consider in evaluating the totality of the circumstances, the decision below would be upheld. Accordingly, review should be denied because the answer to the question presented will not affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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